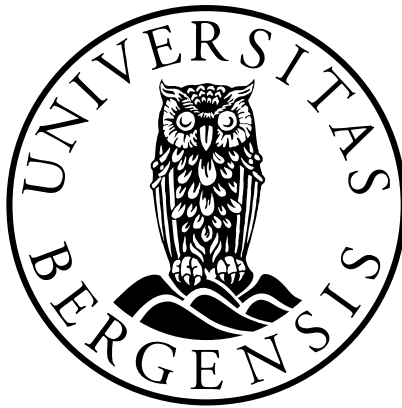


The law of pre-contractual liability in China and Norway: A comparison of the main features

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1 Introduction

1.1 Introduction of the research topic

My research question is as follows:

What are the main differences and similarities between the law of pre-contractual liability in China and Norway?

Since the political normalization dating back to November 2016, there has been a solid rise in business activity between China and Norway.¹ The many examples include investments in land-based salmon plants,² various joint venture agreements, a collaboration for developing sustainable and green shipping solutions,³ a non-stop flight route between Beijing and Oslo,⁴ and the digitalization of China's energy sector.⁵ Considering the complexity of these matters and the agreements governing them, it is safe to assume that they are not results of simple offer and acceptance; they are rather a result of careful negotiations, conducted on a step-by-step basis.

During such discussions, the parties will often develop expectations towards one another. These will sometimes be defined in writing, while they in other cases just occur as a result of the interaction. Examples of such common expectations are mutual honesty about information vital to the contract, collaboration in order to obtain agreement about disputed contract terms, and maintenance of the confidentiality of sensitive information learned in the course of the negotiations. This thesis will, firstly, investigate whether these and other expectations are protected under various circumstances within Chinese and Norwegian law.

¹ China is currently Norway's third most important trading partner behind the European Union (EU) and the United States of America (US); Norges viktigste handelspartnere (2018 January 30). Retrieved from <https://www.ssb.no/utenriksokonomi/artikler-og-publikasjoner/norges-viktigste-handelspartnere>

² Hageskal, A. (2017, June 26). Har fått tomme opp for norsk lakseproduksjon i Kina. *Sysla*, Retrieved from <https://sysla.no/fisk/har-fatt-tommel-opp-for-norsk-lakseproduksjon-kina>

³ Styrket samarbeid om norsk skipsfart. (2018, October 23). *Norges rederiforbund*, Retrieved from <https://rederi.no/aktuelt/2018/statsbesok-kina/>

⁴ Olsen, S. (2019, May 16). First non-stop flight arrives in Norway from China. *Salmon business*, Retrieved from <https://salmonbusiness.com/first-non-stop-flight-arrives-in-norway-from-china/>

⁵ Øyvann, S. (2018, October 17). Kongsberg Digital til Alibaba. *Computerworld*, Retrieved from <http://www.cw.no/artikkel/siste-nyheter/kongsberg-digital-til-alibaba>

If a party has become victim of bad faith in negotiations, it will often experience losses as a result. When in-person negotiations between companies located in China and Norway are taking place, for instance, at least one of the parties will incur travel and accommodation costs. If a Norwegian private equity fund is contemplating the acquisition of a Chinese business, shared corporate information and business secrets may be unlawfully exploited. A Norwegian producer of healthcare technology can invest considerable resources in developing customized technology to a Chinese hospital with the aim of concluding a lucrative contract. As a result of the expectation that a profitable contract will be won, a company may also refuse acceptance of similar offers from third parties. This thesis will also investigate if, and in each case how, these and other losses resulting from a pre-contractual breach may be remedied under the law of pre-contractual liability in China and Norway.

To summarize, the two main considerations when assessing the law of pre-contractual liability are: 1) which acts or omissions imply liability, and 2) what remedies are there in the event of such liability. I will address and discuss both of these issues comparatively.

Such a comparison is of great interest considering both the increased complexity of negotiations and the boosted interaction between China and Norway. Businesses and their advisors should have knowledge about the differences and similarities for acceptable conduct and remedies for unacceptable conduct. The parties can then better make sure their business is conducted in accordance with the applicable law. They may also consider the status of pre-contractual liability in these legal systems when deciding which law shall govern their relationship.

Further in this introduction, in subchapter 1.2, I will be making clear what will not be discussed in this thesis, the delimitations. In subchapter 1.3, I will first place the subject matter of the thesis in a wider context and present a more detailed overview of the rules on pre-contractual liability in China and Norway. This includes giving an account of the historical background of the law in the two countries and defining its place in the legal system. Then, in subchapter 1.4, I will give an account for the relevant sources of law and applicable legal method. Lastly, I will conclude the introduction part by describing the structure of the rest of the thesis.

1.2 Delimitations

Since this thesis concerns the imposition of responsibility at the pre-contractual stage, liability arising from situations occurring either before or after this phase, are beyond its scope. I will further assume an ordinary party constellation meaning that special considerations relating to, for example, bidding law, contracts to which the government is a party, or consumer rights will not be pursued. Additionally, in respect of remedies for breach of pre-contractual duties, this thesis will be limited to assessing the *methods* for measuring damages and will not comment on how the actual calculation should be carried out.

I will focus on the differences and similarities as to the practical application of the law of pre-contractual liability in China and Norway. This means that I will only address the topic of this thesis *de lege lata* and not *de lege ferenda*. The broad variety to the ways in which a party may act in bad faith as well as the limitations set out by the scope of this thesis, however, makes it impossible to give a complete outline of *all* thinkable situations which may arise and their potential solutions. I will therefore concentrate on the main features. Beyond focusing on the general structure and presenting the starting point, I have chosen to compare five different types of situations for illustrating the practical applicability of the basis of liability.

1.3 Further review of the subject matter

1.3.1 Historical background

The view as to whether a party enjoys protection before a final contract is concluded has traditionally been divided between common and civil law countries. Common law legal systems generally take the view that the parties in capacity of private autonomy must enter into a formal contract in order for a legal relationship to be created,⁶ whilst the civil law countries emphasize that since the parties engage in a collaborative effort also when they are

⁶ In the often referred to *Walford v Miles* case, [1992] 2 AC 128, Lord Ackner described a duty to negotiate in good faith to be "as unworkable in practice as it is inherently inconsistent with the position of a negotiating party".

negotiating, they are entitled to legal protection.⁷ The civil law view is adopted both in Chinese law and Norwegian law.

In China, the principle of pre-contractual liability derives from German law precedents.⁸ The latter obliged a party to act in good faith or to take reasonable care towards the other party in the pre-contractual phase.⁹ This doctrine was developed by the German legal scholar Rudolf von Jhering, who wrote about *Culpa in Contrahendo* in his article from 1861.¹⁰ Even though von Jhering based his findings on medieval legal science,¹¹ jurisprudence is generally of the view that his work has laid the foundation for the development of the law of pre-contractual liability as we know it today in most civil law countries. Consequently, the law of pre-contractual liability within Chinese law shares its roots with most other legal systems.

Certain provisions of the former PRC Contract law of 1981 and the General Principles of Civil law partially accepted the idea of *culpa in contrahendo*. The current Contract Law of the People's Republic of China (CCL)¹² also contains provisions on pre-contractual liability which bear resemblance to von Jhering's doctrine.¹³ Moreover, when adopting these provisions, the Chinese lawmakers made numerous references to foreign civil law theories and international soft law principles such as UNIDROIT, PECL and PICC.¹⁴

Notwithstanding the influence that Western and international legal sources have had on the statutory provisions on pre-contractual liability within Chinese law, the doctrine has Chinese characteristics. Chinese courts will not consider foreign law when interpreting Chinese law and will pay limited regard to international soft law.¹⁵

⁷ John Cartwright & Martijn Hesselink, *Precontractual Liability in European Private Law* (Cambridge University Press 2008), p. 449 ff.

⁸ Han Shiyuan, "Culpa in Contrahendo in Chinese Contract law", 6 *Tsinghua Law review*, 2014 (pp. 157-170) p. 158.

⁹ Li Xiaoyang, "The Legal Status of Pre-Contractual Liability: Contrasting Responses from German and English Law", *National Taiwan University Law Review Volume 12: 1*, 2017 (pp. 127-175) p. 133.

¹⁰ Rudolf von Jhering, "Culpa in contrahendo, oder Schadensersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen", *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, 1861 Bind 4, 1.

¹¹ Barbara Pasa, "Pre-contractual Liability from a Civil Lawyer's Perspective". In Larry Dimatteo & Chen Lei, *Chinese Contract Law: Civil and Common Law Perspectives*, 2017 (pp. 160-189) p. 162.

¹² Promulgated 15 March 1999.

¹³ Han, p. 158.

¹⁴ Ibid.

¹⁵ Liu Qiao & Ren Xiang, "CISG in Chinese Courts: The Issue of Applicability". In *The American Journal of Comparative Law*, Volume 65, Issue 4, 2017, (pp. 873-918).

In Norway, the doctrine has been developed gradually through several Supreme Court decisions,¹⁶ without reference to legal theories beyond Norwegian borders. The doctrine is still likely to have been influenced by similar legal cultures with already developed rules on pre-contractual liability.¹⁷

1.3.2 The position of pre-contractual liability in the legal landscape

In China and Norway, the rules on contract formation, interpretation of contracts, breach of contracts and remedies for breach of contracts, are to a large degree the same. They have both adopted the United Nations Convention on Contracts for the International Sale of Goods (CISG) and have used the Convention as model for certain important laws.¹⁸ The CISG does not, however, contain rules about the *pre-contractual* phase.

Generally, this phase may be defined as the engagement of two or more parties in negotiations with the aim of concluding, or at least evaluating the possibility of forming a binding contract.¹⁹ While it starts when at least one of the parties belief in the existence of a mutual will to contract, it ends when the contract is effective in accordance with the rules of contract formation. As this represents something in between a non-existing legal relationship and a mutually binding contract, legal scholars in both China and Norway have debated whether pre-contractual liability should be regarded as part of contract law or general tort law.²⁰ In China, pre-contractual liability is a separate doctrine which can function in concurrence with general tort and contract law,²¹ while the Norwegian law of pre-contractual liability is a form of special regulation of the culpa norm.²² The latter may, as a result, not overlap with tort or contract law.

Regardless of classification, it is important to recognise that pre-contractual liability contains elements of each: contract law because the parties have established a form of legal relationship; and tortious liability because the issue in question is whether compensation may be imposed for acts or omissions performed outside an established contractual relationship.

¹⁶ With the first clear legal basis as late as in year 1992; Rt-1992-1110 (Stiansen judgment), p. 1115.

¹⁷ And among these; German law.

¹⁸ The Norwegian Sale of Goods Act of 1988 and the 1999 Contract Law of the People's Republic of China both contains implementations of the CISG.

¹⁹ Lasse Simonsen, *Prekontraktuelt ansvar*, Oslo 1997, p. 5.

²⁰ See e.g. Simonsen, p. 164 and Han, p. 165.

²¹ Bing, p. 217.

²² Simonsen, p. 252.

Chinese and Norwegian law share the same main requirements for imposing liability both in contract and according to general tort law, and these requirements have also been adopted to the pre-contractual phase. Firstly, fault, meaning either intent or negligence, is generally considered a requirement for imposing pre-contractual liability.^{23 24} A second common requirement is that no compensation may be claimed without any loss suffered, and, lastly, there must be a causal link between the loss and the action or omission performed at the negotiation stage for liability to be imposed. Remedies are also largely derived from general tort law principles, including assessment of damages.

1.4 Sources of law and legal method²⁵

1.4.1 Relevant sources of law and legal method in China

The Chinese legal system is primarily a socialist Civil Law system.²⁶ Statutory law is consequently the legal source with highest authority within Chinese law. When assessing whether a pre-contractual norm has been breached, the starting point is the CCL, which has status as individual law. Individual laws are number two in the statutory hierarchy, first is the Constitution. There are however no statutory laws directly applicable to *remedying* a pre-contractual breach.

The highest Court in China is the Supreme People's Court of the People's Republic of China (SPC), which has the right to review decisions from all other courts in the jurisdiction.²⁷ The role of the SPC is not to clarify or develop general legal rules, but rather to resolve the specific legal disputes it hears. Since the courts have heard few cases where pre-contractual liability has been claimed, its contribution to the law of pre-contractual liability is limited. Furthermore, its decisions do not carry any precedence, meaning that neither the Court itself nor lower Courts are *legally* bound by previous decisions.²⁸ Since the SPC decisions are

²³ Simonsen, p. 252.

²⁴ Ling Bing, *Contract Law in China*, Hong Kong (2002), p. 214.

²⁵ The quotations from legal sources in this thesis are all in English. The translations used are provided by various sources, and I will refer to the respective source whenever using quotations.

²⁶ Jiang Dong, "An Introduction to Chinese Legal Culture", in Koch, Skodvin, Sunde, *Comparing Legal Cultures* (pp. 317-358), p. 321.

²⁷ Ibid, p. 322.

²⁸ Ibid, p. 337.

highly regarded and expresses the current prevailing legal norms, judges will however often *de facto* rule in accordance with SPC decisions.^{29 30}

The SPC also has the ability to assume the role of legislator. The first method is by passing so-called "Judicial Interpretations", which are nationally enforceable interpretations made by the SPC comprising detailed rules with general nature. Such Judicial Interpretations are given within the area of pre-contractual liability, although limited to very specific circumstances. *Jiang* holds that Judicial Interpretations are "another form of legal rules with general nature",³¹ while *Fu* is of the view that they are "analogous to legal code".³²

The second method is by selecting *Guiding Cases*, which are effective judgments from lower courts that are considered to be both in accordance with desired legal views and are deemed as contributing to jurisprudence beyond statutory law. Such Guiding Cases can be found within the area of pre-contractual liability and will be presented in this thesis. It must however be highlighted that the SPC itself has not yet expressly commented on the legal force of Guiding Cases. The lower courts have been asked to simply "quote the Guiding Case as a reason for their adjudication, but not cite it as the basis for their adjudication".³³

According to *Jiang*, this supports the view that guiding cases are binding *de facto* but not *de jure*.³⁴

Beneath the SPC, the trial bodies in the main court hierarchy in descending order of ranking are the High People's Court, Intermediate People's Court and Basic People's Court. There are a number of cases heard by these courts that concern a claim for pre-contractual liability, but their decisions are not recognized as having any normative value. However, if there are no other legal sources, I will nonetheless present cases from lower courts. Although their judgments do not have status as judicial precedent, these courts consist of trained judges whose judicial examination at least offers a contribution to this thesis.

There are several publications on the law of pre-contractual liability, also in English. However, the work of legal scholars does not carry any legal authority either. Since these

²⁹ Liu Nanping "'Legal precedents' with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court", *Journal of Chinese Law* 5.1 (1991), (pp. 107-140) p. 108.

³⁰ Wei Luo & Joan Liu, *A Complete Research Guide to the Laws of the People's Republic of China (PRC)*, 2003, p. 4.

³¹ Jiang, p. 332

³² Fu Yulin, "The Chinese Supreme People's Court in Transition". In Van Rhee, Cornelis Hendrik, Fu: *Supreme Courts in Transition in China and the West*, Maastricht 2017, (pp. 13-36) p. 27.

³³ Jiang, p. 332.

³⁴ Ibid.

scholars are highly qualified and specialised academics with the same legal education and approaches to legal issues as Chinese judges and, as such, are nonetheless well-suited to examine the current law of pre-contractual liability in China, their opinion still offers great argumentative value.³⁵ Furthermore, legal theory is very helpful in systematising and delivering a comprehensive presentation of legal sources. I will therefore make numerous references to legal theory in this thesis, but not dedicate any weight to them as a legal source *per se*.

As set out above, there are few authoritative legal sources governing the law of pre-contractual liability in China. On the other hand, there exists a fair amount of cases from lower courts as well as publications.

1.4.2 Relevant sources of law and legal method in Norway

Statutory law is the highest authority of legal sources within Norwegian law. Since written laws often are formulated in a short and discretionary manner, the preparatory work from drafting the laws often contains detailed discussions and guidance as to how the law should be applied. Although the rules on pre-contractual liability in Norway are non-statutory, certain statutory provisions, including their preparatory work, are of significance for this assessment.³⁶

As said, the doctrine of pre-contractual liability has been developed by the Supreme Court, who's judgments form precedents, meaning that they are binding on lower courts and the court itself.³⁷ There are, however, few cases which have been heard by the Supreme Court relating to the issue, and in those cases, pre-contractual liability has always been brought before the Court as an alternative claim to the primary claim (that a binding agreement has been concluded). As a result, pre-contractual liability often receives less attention in the litigation, impacting the clarifications which are offered by the Court. It has therefore been left to legal scholars to develop both the width and the depth of the law of pre-contractual liability beyond the position as set out in Supreme Court decisions. The most detailed work has been conducted by Lasse Simonsen in his book *Prekontraktuelt ansvar*,³⁸ which will be

³⁵ Meaning that they are only persuasive as opposed to binding.

³⁶ As will be showed in Chapter 2.

³⁷ Erik Monsen, *Innføring i juridisk metode og oppgaveteknikk* (2012), p. 154.

³⁸ See note 19.

referred to extensively in this thesis. The weight of legal theory is however limited to its argumentative value and will consequently only be used for this purpose.

Beneath the Norwegian Supreme Court operate two further, ordinary courts of law. These comprise the Appellate Court and District Court, whose decisions do not carry precedents. I will refer to certain cases from the Appellate Court in this thesis.

I will also be referring to certain cases from the Swedish Supreme Court. As far as it promotes legal unification, foreign law is a legitimate source for legal reasoning under Norwegian law.^{39 40}

As is the case in China, there are consequently few authoritative sources concerning the Norwegian doctrine of pre-contractual liability. *Prekontraktuelt ansvar* by Lasse Simonsen however constitutes a thorough and comprehensive presentation of the subject matter.

1.5 Further structure

Proceeding with this thesis, I will firstly investigate the differences and similarities between the scope of liability within Chinese and Norwegian law (chapter 2). In that part, I will first highlight the main considerations behind imposing liability for bad faith behaviour. Then, I will present the general starting point for assessing the scope of liability within the respective jurisdictions before I focus on specific types of situations. I will discuss particularly the boundary between accepted negotiation tactics and a duty to disclose relevant information or provide truthful information, the boundary between what information received in the course of the negotiation that may be shared or exploited and not, and whether the existence of a preliminary agreement makes any difference to acceptable behaviours during negotiation of a contract.

In the following chapter, I will go on to consider the rules on remedies for liability (chapter 3). Issues that will be discussed include whether remedies can be claimed only in the shape of monetary compensation, if the aggrieved party can claim reliance damages, expectation damages or both, and whether both direct and indirect losses are recoverable.

³⁹ Ibid p. 45.

⁴⁰ Rt-1994-1584, p. 1587.

Chapter 4 will consist of a presentation of aspects of Chinese law that are fundamental to consider in order to conduct a meaningful analysis of how the law of pre-contractual liability in China is to be understood in practice. Here, I will show how unpredictable dispute resolution in China is and highlight aspects of Chinese culture that prevent parties from going to court with a claim for pre-contractual liability.

In addition to the consecutive comparison of the various types of situations in chapter 2 and the comparative summary at the end of chapter 3, I will also include a chapter 5, in which I summarise my comparative findings.

2 Scope of liability

2.1 The balancing of freedom of contract and pre-contractual liability

The principle of freedom of contract is a valued concept in most modern legal systems and dictates that contracts are based on a mutual agreement and freedom of choice. Although Chinese law does not formally contain the principle of freedom of contract, the right to enter into contracts voluntarily as set out in Article 4 of the CCL has generally been understood as freedom to decide whether to conclude a contract, with whom to contract, and the terms and the form of the contract.⁴¹ Unlike traditional freedom of contract, the right must be exercised "according to law".⁴² In comparison, the Norwegian operates with the principle of freedom of contract and the delimitations of this right must be *provided by law*.⁴³ In Chinese law, however, Bing holds that the "substantive rights recognised under the principle of voluntariness is almost identical to those under the conventional notion of freedom of contract".⁴⁴

The abovementioned principles also imply that a party has the freedom not to contract. Since imposition of liability at the negotiation stage only becomes relevant when one of the parties is unwilling to enter into the contract in question, pre-contractual liability stands in direct conflict with the principle of freedom of contract. The greater the scope of liability, the more the principle of freedom of contract becomes restricted. In shaping the rules on pre-contractual liability, a balance, therefore, must be struck between protecting the parties to a negotiation from becoming victims of one side's bad faith on the one side and respecting the fact that the parties have not bound themselves to a contractual agreement on the other. When finding the balance between party autonomy and negotiation strategies that are harmful and unwanted, multiple considerations must be made. If freedom to negotiate without subsequent liability were very limited, businesses may refrain from becoming involved with prospective collaborative partners. Such lack of economic activity would be detrimental to any market

⁴¹ Bing, p. 43.

⁴² Translation by Bing, p. 42.

⁴³ Geir Woxholth, *Avtalerett*, 10th edition, Oslo 2017, p. 27.

⁴⁴ Bing, p. 43.

economy. On the other hand, businesses could also refrain from negotiating a contract if they are not secured against losses in reliance upon a future contract being concluded. The optimum is therefore if the rules on pre-contractual liability are balanced in a way that ensures the needs of both parties to the negotiations are met pursuant to the prevailing business norms in their area of practice and the values of the legal system in which they operate. When the rules are adjusted to the common perception in this way, negotiating parties will experience them as predictable. This will lead to more transactions taking place, which is desired in a market economy.

From a socioeconomic perspective, the aim should be to waste as little created value as possible. If four architect firms are requested to develop a custom-made sketch for a building project, each with their individual belief that they are the only one asked but with only one of the four eventually chosen, the three others will have wasted their resources without contributing to market growth or development. This principle therefore suggests that pre-contractual liability should be imposed in such cases.

The role of legal regulation is, in many ways, to reflect the social culture and the specific area of life that it concerns. Therefore, in defining both the general legal basis for pre-contractual liability and handling specific cases, the principle of *fairness* should also be considered.

2.2 The starting point for the liability assessment

In Chinese law, the general standard for behaviour at the negotiation stage is that it must be in accordance with "good faith", as set out in Article 42 (3) of the CCL. Since this broad standard to a limited degree has been specified in authoritative legal sources, it is difficult to predict how it will be applied in various types of situations.

Bing however highlights that the key test when assessing whether a particular behaviour breaches the good faith principle, is "whether the defendant's behaviour falls below what is expected of a reasonable person on the basis of the moral, social and commercial standards of conduct prevailing in the community concerned".⁴⁵ The SPC further held in the case of *Xingye Global Fund Management Co. Ltd. v Jiangsu Rongsheng Heavy Industry Co. Ltd*⁴⁶ that the nature and purpose of the contract in question and the relevant usage of the

⁴⁵ Ibid. p. 217.

⁴⁶ (2013) Min Shen Zi No. 1881.

transaction must be taken into consideration when defining the specific content of a pre-contractual obligation.⁴⁷

Certain types of situations have been regulated separately; Article 42 (1) provides that bad faith-negotiations in the pretext of concluding a contract will amount to liability and Article 42 (2) holds accountable a party that either conceals a material fact relevant to the conclusion of a contract or that provides false information. Further, Article 43 of the CCL establishes that negotiating parties may not disclose or improperly use trade secrets learned in the course of negotiations. All the mentioned situations are regulated separately because they are considered to be of practical importance and automatically constitute a breach of the good faith standard, whilst circumstances which fall outside of these Articles are subject to the good faith-test as set out in the catch-all provision of Article 42 (3).

In Norway, the rules on pre-contractual liability are part of the broader doctrine of the *Duty of Loyalty in Contractual Relationships*. The Supreme Court has, as said, only delivered a few judgments where compensation for a pre-contractual breach was claimed. The Court has however generally expressed, in respect of pre-contractual liability, that "(...)the basis is that a blameworthy behaviour must have been exercised in the course of the negotiations – disloyalty, dishonesty, inducement or the like".^{48 49} This formulation coincides with the view promulgated in legal literature; that the standard for becoming liable at the pre-contractual stage is a form of special regulation of the culpa norm.⁵⁰ This involves that the parties, within the respective area of life in which they operate, must act as would a reasonable person of ordinary prudence have done.⁵¹

Simonsen further holds that general factors that should be considered when deciding whether or not a party is at fault when negotiating comprise: (i) who the parties are; (ii) the commercial relationship between them; (iii) the extent of the negotiations; and (iv) the type of investments made.⁵²

⁴⁷ Ding Chunyan, "The Doctrine of Precontractual Liability under Chinese Law: A Comparative Outlook". In *European Review of Private law* 27 (3) (2019) pp. 1-30, p. 4.

⁴⁸ Rt-1998-761, p. 772.

⁴⁹ My translation.

⁵⁰ Simonsen, p. 252.

⁵¹ For a nuanced discussion of which standard a person according to general tort law is expected to live up to, see Viggo Hagstrøm & Are Stenvik, *Erstatningsrett*, Oslo (2015), pp. 68-71.

⁵² Simonsen, p. 162.

Chinese and Norwegian law consequently coincides by requiring fault for liability to be imposed. Furthermore, both jurisdictions recognize that which expectations towards a party's behaviour that is legitimate depends on general factors such as the community the transaction takes place in and the nature of the transaction.

Concerning the type of situations that now will be presented in subchapters 2.3-2.7, it is important to note that fault, meaning either intent or negligence, is a general requirement for demonstrating a basis of liability under both Chinese and Norwegian law.

2.3 Negotiating without a genuine intent to contract

2.3.1 Introduction

Businesses sometimes enter into negotiations despite having no intention of concluding a final contract. The negotiations are instead used as a pretext for the purpose of, for example, obtaining private information from the opposite party or frustrating its attempt to enter into a contract with a competitor. This part will assess whether, and if so on what grounds, negotiating without a genuine intent to contract results in liability within Chinese and Norwegian law.

2.3.2 Chinese law

Article 42 (1) of the CCL imposes liability on a party who "negotiates in bad faith under the pretext of concluding a contract".⁵³

The wording "pretext" refers to the situation where the defendant uses the negotiations for an ulterior motive without having any real intention to conclude a contract. The defendant's extended negotiations with the aggrieved party which do not result in an agreement, are consequently, not in themselves sufficient to impose liability under this Article.⁵⁴

In assessing any alleged pretexts for bad faith, there will likely be significant challenges in attempting to prove any alleged malicious intention. However, the defendant's overall

⁵³ Translated by Bing, p. 214.

⁵⁴ Bing, p. 216.

behaviour in the negotiations will function as circumstantial evidence in this regard. Examples include insistence on unreasonable terms, capricious reversal on previous positions, persistent requests for irrelevant information and unjustified delays in responding.⁵⁵ Importantly, there is neither a requirement that the defendant had any intention to cause loss to the aggrieved party nor that the aggrieved party identified the defendant's motivations in negotiating without intent to form a contract.⁵⁶ The absence of such intent and a loss thereby caused, is sufficient.

2.3.3 Comparison with Norwegian law

The Supreme Court of Norway has yet to resolve a case concerning the situation where a party negotiates without a genuine intention to enter into a contract. The view in legal theory is however that liability should be imposed in such situations.⁵⁷ This rule accords with the values upon which the statutory provisions on fraud are based,⁵⁸ as well as the principle of fairness. Even though there is no authoritative legal source dictating this situation, the mentioned arguments combined provides a secure legal basis for liability.

As such, in respect of negotiations in bad faith where there is an underlying pretext to the conclusion of the contract, Chinese and Norwegian law are congruent in that they both impose liability for such behaviour. It is neither a requirement that the liable party had an intention to cause a loss or that the motivation behind his acts is identified within any of the legal systems.

The practical challenges incumbent upon proofing that the defendant lacked such an intention to enter into an agreement, are also congruent in both legal systems. In any case in which there is a deficiency of clear evidence, the question of liability must be considered against the other rules of pre-contractual liability. These are generally based on more objective standards and thus do not contain the same challenges in terms of proof.

⁵⁵ Ibid.

⁵⁶ Ding, p. 5.

⁵⁷ Simonsen, p. 196.

⁵⁸ Article 30 of Norway's Contract Act of 1918.

2.4 Concealing material facts or providing false information

2.4.1 Introduction

It is particularly important to be well informed when negotiating a contract. Sometimes one of the parties experiences losses as a result of the opposing party concealing information or providing false information relevant to the contract. This part will investigate if liability may be imposed in such circumstances.

2.4.2 Chinese law

According to Article 42 (2) of the CCL, he who in the course of concluding a contract "intentionally conceals a material fact relevant to the conclusion of the contract or gives false information"⁵⁹ is liable. It is important to note that the scope of the article is limited to *intentional* acts.

The wording "material" restricts the scope of concealed information to that which is considered important. In the SPC case *Xingye Global Fund Management Co. Ltd. v Jiangsu Rongsheng Heavy Industry Co. Ltd.*,⁶⁰ the court applied the general principle of good faith when interpreting which concealed facts that are comprised of the term, and held that the specific content of the obligation must be determined in conjunction with the nature and purpose of the contract in question and the relevant usage of the transaction.⁶¹ Bing further provides guidance to the assessment by stating that what should be regarded as "material" depends on the nature and purpose of the negotiations and the parties' intentions.⁶²

Article 42 (2) is absolute in stipulating that all kind of provision of *false information* results in liability. However, even though the above mentioned SPC case concerned concealment of information rather than the provision of false information, it is submitted that the methodological approach applied therein would likely be the same in the latter; Article 42 (2) is a casuistic reflection of the good faith-standard in Article 42 (3) and should therefore be

⁵⁹ Translated by Bing, p. 214.

⁶⁰ (2013) Min Shenzhi No. 1881

⁶¹ Ding, p. 4.

⁶² Bing, p. 217.

applied with a view to the standard. Provision of information that is considered to be within the norms of negotiation tactics must therefore be accepted even if it is untrue. Liability may normally not be imposed, for instance, if a party provides false information by saying that it has given its "best and final offer". Where the line should be struck between acceptable and unacceptable provision of false information of such character, is however difficult to demarcate.

In case in which a contract is concluded subsequent to the provision of false information or a non-disclosure comprised by Article 42 (2), the paragraph is still applicable. This means that the innocent party may be able to confirm the voidable contract and still claim pre-contractual liability.⁶³

In case of *negligent* non-disclosure of material information or misrepresentation, Article 42 (2) is not applicable, but such conduct may very well violate the principle of good faith in Article 42 (3). In the case *Beijing Zhongrui Cultural Dissemination Ltd. v Beijing Lingdian Market Investigation and Analysis Co.*,⁶⁴ rendered by Beijing Second Intermediate People's Court, the defendant became liable for negligent non-disclosure of an existing trade usage and the plaintiff's option to "buy out" the investigation service in question. The defendant was a professional market investigator well aware of the mentioned usage of trade.⁶⁵

2.4.3 Comparison with Norwegian law

As is the case under Chinese law, the general basis in Norway is that liability shall be imposed upon a party in which provides false information or conceals information relevant to the contract.⁶⁶

It is submitted that also Norwegian law contains a threshold for liability to be established. Regarding terms upon which a party is willing to contract when negotiating a contract, for example, the appellate court has said that the "clear basis is that a party does not have a duty to inform the opposite party about tactical and commercial considerations during the

⁶³ Bing, p. 217.

⁶⁴ *SPC Gazette*, 1999, No. 3 p. 100.

⁶⁵ Bing, p. 219.

⁶⁶ Simonsen, p. 181.

negotiations".^{67 68} While this basis seems reasonable, the exact line between tactical and commercial considerations and information which goes beyond that, is naturally difficult to draw. Based on two orders from the Swedish Supreme Court,⁶⁹ it is further held by Simonsen that a party may be obliged to inform the other about conditions of significance for the probability that a contract will come to be.⁷⁰

More generally, he holds that, when assessing the legal boundaries for acceptable lies or concealment of information, a view must be taken as to the prevailing norms in the specific business community where the transaction takes place and the relationship between the parties in question.⁷¹ The topic of assessment is thus similar to that of Chinese law, since the mentioned considerations is inherent to the good faith assessment. Even though the assessment is the same, there may, however, still be differences in the result of the assessment within Chinese and Norwegian law since the view of what behaviour is 'acceptable' in each country during negotiations is likely to be different.⁷²

In case facts relevant to the conclusion of the contract are concealed or false information provided, the Norwegian doctrine of pre-contractual liability is not applicable after a contract has been entered into, which represents a systematic difference compared to Chinese law. Under Norwegian law, such a claim must be pursued according to the general rules of contract law. Even though the two legal systems operate with systematically different approaches, the rules are however very much alike.

⁶⁷ LF-2005-28854 (Frostatting). The case was reviewed by the Supreme Court, who considered a binding agreement to exist and therefore did not comment on this issue.

⁶⁸ My translation.

⁶⁹ NJA 1990 s. 745 and NJA 1978 147.

⁷⁰ Simonsen, p. 192-193.

⁷¹ Simonsen, p. 219.

⁷² Due to the features highlighted in chapter 4.

2.5 Protection of confidential information

2.5.1 Introduction

When negotiating a contract, information of a confidential nature is sometimes shared. This part examines the circumstances in which a party who learns about such information has a duty to refrain from disclosing or exploiting it.

2.5.2 Chinese law

Without regards to the specific nature of the information, if a party receives information on the condition that it shall not be disclosed or in other ways exploited, failure to fulfil this promise will result in liability.⁷³

According to Article 43 of the CCL, “Whether or not the contract is concluded, trade secrets learnt by a party in the course of the conclusion of the contract shall not be disclosed or improperly used. A party who discloses or improperly uses such trade secrets, thereby causing damage to the other party, shall bear liability for compensation”.⁷⁴

“Trade secrets” is not defined in the CCL, but the definition of the same term in Article 9 (3) of the Anti-Unfair Competition Law of 2019 is commonly adopted.⁷⁵ According to the Article, “trade secrets” refer to “technical information or business information which is unknown to the public, can bring about economic benefits to the entitled person, has practical utility and in respect of which the entitled person has taken measures to protect its secrecy”.⁷⁶

According to a Judicial Interpretation given by the State Administration for Industry and Commerce (SAIC),⁷⁷ the wording “unknown to the public” means that the information cannot be directly obtained through public channels.⁷⁸ SAIC's interpretations further hold that the measure the aggrieved party must have taken to protect the secrecy, may be “the conclusion

⁷³ As will be explained in chapter 2.6, such behaviour constitutes a contractual breach.

⁷⁴ Translated by Bing, p. 220.

⁷⁵ Bing, p. 220 refers to the formerly prevailing Anti-Unfair Competition Law of 1993 Article 10 and Article 9 (3) of the current law is fully corresponding.

⁷⁶ Translated by Bing, p. 220.

⁷⁷ Certain Rules on the Prohibition of Infringement of Trade Secrets, *Law Collection*, 1995 supplement, p. 1266, art. 2 (5).

⁷⁸ Bing, p. 221.

of secrecy agreements, the establishment of systems for the protection of the secrecy and other reasonable measures for protecting the secrecy”.⁷⁹ “Other reasonable measures” is in turn interpreted as including requests for confidentiality by the entitled person to employees and business partners.⁸⁰ In the case *Beijing Siweige-Taide Electronic Engineering Co. v Beijing Yinlan Science & Technology Co. and Others*,^{81 82} rendered by Beijing Haidian People's Court, the Court was however of the view that signing Confidentiality Agreements with *clients* not necessarily is required. The Court ruled that the business in question had taken reasonable measures by denying clients access to the substance of a certain technology the company delivered, concluding Confidentiality Agreements with its employees and strengthening the internal management of its organization.⁸³

If intentional or negligent infringement of trade secrets results in heavy losses for the entitled person, fines or imprisonment may be imposed in accordance with Article 219 of the 1997 Criminal Law of the People's Republic of China. There are also several laws that imposes liability in case of infringement of Intellectual Property Rights.⁸⁴

2.5.3 Comparison with Norwegian law

Where the parties have expressly agreed that specific information given in the course of the negotiations may not be shared or taken advantage of, breach of that agreement would constitute pre-contractual liability also under Norwegian law.⁸⁵

Where no such agreement exists, a duty to respect the secrecy of certain information may be based on the Duty of Loyalty in Contractual Relationships. The standard on "good business practice"⁸⁶ as laid down in the 2009 Marketing Practices Act Article 25, is considered a form of special regulation that defines the content of the Duty of Loyalty within the area of trade

⁷⁹ Ibid.

⁸⁰ SAIC Reply to the Question Concerning the Constituent Elements of Trade Secrets (1998), Gong Shang Gong, (1998), No. 109 – Bing Ling p. 221 note 679.

⁸¹ SPC Gazette, 1998, p. 107.

⁸² The case is a Guiding Case.

⁸³ Bing, p. 221.

⁸⁴ Such as the 2008 Patent Law of the People's Republic of China Article 60 and the 2010 Copyright Law of the People's Republic of China Article 47.

⁸⁵ Simonsen, p. 189.

⁸⁶ My translation.

secrets.⁸⁷ This involves a general duty of confidentiality, where both parties must be able to share certain information in confidence that it will not be spread further.⁸⁸

The formulation in the general regulation of professional secrecy as laid down in Article 13 of the 1967 Public Administration Act, is also considered to provide usable guidance in defining the scope of the duty of confidentiality when such non-disclosure is not expressly agreed upon.^{89 90} According to the Article, besides "technical arrangements and methods", this will include "operating and business conditions that is of competitive signification to keep secret".⁹¹ The preparatory work states that there is a requirement that the information is unknown to the public and unavailable through public channels. Furthermore, the information must according to the same source be of significance, and of such a character that it appears natural to assume that it is considered to be a secret within the concerned field of business.⁹²

Thus, Chinese and Norwegian law have a similar comprehension of the types of information which enjoy protection in the pre-contractual phase. Both technical and commercial information is considered to be in the core of what is protected in both legal systems. Both countries also concur in what they consider to be a "secret" regarding such as information that is not directly obtainable through public channels.

As set out above, Chinese law contains an additional requirement that the plaintiff must have taken measures to protect the secrecy of the information. If such measures are not taken, the information is not considered a trade secret despite the other criteria being fulfilled. There is however reason to believe that such a difference will not be of great significance in practice. In the above case from Chinese law, the measures considered sufficient in keeping the information secret, such as withholding the secret information from clients, concluding secrecy agreements with employees and having an acceptable internal management in the organization, are acts which would normally be carried out, as matter of course, in respect of information that a party wished to keep confidential.

⁸⁷ Simonsen, p. 190.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ If Article 13 of the Public Administration Act is applied directly, remedies for breach include fines and imprisonment, see Article 209 of the 2005 Criminal Act. Such harsh remedies result in stricter requirements for imposing liability, and the threshold for becoming liable is therefore expected to be lower when it comes to pre-contractual situations where compensation is the only potential remedy, see Simonsen, p. 190.

⁹¹ My translation.

⁹² Ot.prp. nr. 3 (1976-1977) p. 22.

Congruent with Chinese law, obtaining of business secrets during negotiations in the way contemplated by Norway's Criminal Act of 2005 Article 208, may be punished with fines and imprisonment. There are also statutory rules that impose liability for infringement of various Intellectual Property Rights which may be applied at the negotiation stage.⁹³

2.6 Breach of preliminary agreements

2.6.1 Introduction

In this part, I will focus on situations in which the parties have reduced a common understanding for acceptable behaviour when negotiating in writing, typically specifying what already is agreed upon, what remains, and how further negotiations will be carried out. In other words, this represents an incomplete agreement or an agreement to agree. The most common of such pre-contracts are a *Letter of Intent* and *Memorandum of Understanding*.

2.6.2 Chinese law

The legal consequences of a written pre-contract must be considered against the good faith-test in Article 42 (3). In the Supreme People's Court Interpretation Concerning the Application of Law in the Trial of Cases of Disputes over Sales and Purchase Contracts⁹⁴ Article 2, a "pre-contract" is essentially recognised as a partial agreement, and is, according to case law and legal literature, binding.⁹⁵

The fact that pre-contracts are binding does not however mean that liability will be imposed if the parties fail to conclude a contract. Even though discretionary terms must be complied with in the sense that they are binding, the parties will often have a considerable freedom before such standards are breached. For instance, if a preliminary agreement contains a clause stating that each of the parties must make "best efforts" towards reaching an agreement but the negotiation fails after a whole-hearted attempt from both sides, liability will not be imposed. On the other hand, details of a specific nature will generally be considered as

⁹³ Such as the 2018 Copyright Act Article 81 and the 1967 Patent Act Article 58.

⁹⁴ Promulgated on 10 May 2012 and effective as of 1 July 2012.

⁹⁵ Shen Wei, Liability Prior to Contract Formation in Chinese Contract Law. In Larry DiMatteo & Lei Chen (eds) *Chinese Contract Law: Civil and Common Perspectives* (Cambridge University Press 2017), Chapter 6, pp. 137-159, p. 141.

binding. Among other things, this included provisions dealing with confidentiality, exclusivity, governing law, and dispute resolution.⁹⁶

Another example of how a preliminary agreement may have independent contractual status for the purposes of assessing liability at the negotiation stage, can be found in the mentioned SPC Interpretation. If the parties agree that a sale and purchase contract will be entered into within a certain period in the future and one of them fails to perform the obligation of entering into the contract in question, the court shall uphold any claim stating that the breaching party must assume liability for the violation of the pre-contract.⁹⁷

When deciding whether certain terms in a written pre-contract have been agreed in such a way that they are binding, Chinese courts will take a holistic approach with regards to the circumstances surrounding the transaction as well as business common sense and usage.⁹⁸

2.6.3 Comparison with Norwegian law

According to the Supreme Court of Norway, the fundamental principle is that a preliminary agreement is binding as far as it ranges.⁹⁹ The parties can thereby, also under Norwegian law, specify certain terms with binding effect before they conclude the final contract.

Vague terms in preliminary agreements may very well also affect the threshold for becoming liable.¹⁰⁰ Because the protected interest, which is the reason for imposing liability at the pre-contractual stage, within Norwegian law is the trust between the parties,¹⁰¹ the relevant principle for assessing whether a pre-contract is binding, is what reasonable expectations the pre-contract gives the parties rather than the fact that a pre-contract formally has been entered into.¹⁰² If two parties conclude a preliminary agreement containing vague formulations that do not impose more duties on the parties than those already imposed by the Duty of Loyalty in Contractual Relationships, this, consequently, will not *in itself* affect the threshold for liability. However, the expectations of loyalty from the opposite party may become

⁹⁶ Hua Zhang, Remedies for Breach of Preliminary Contract, Journal of Law Application (2019), Issue 2.

⁹⁷ Shen, p. 146.

⁹⁸ Patrick Zheng & Charles Qin, Llinks Dispute Resolution Bulletin; Chinese Supreme Court Rules on Letter of Intent, p. 3. Retrievable from http://www.llinkslaw.com/uploadfile/publication/71_1554083384.pdf

⁹⁹ Rt-1992-1110 (Stiansen judgment), p. 1114.

¹⁰⁰ Ibid., p. 244.

¹⁰¹ Ibid., p. 171.

¹⁰² Ibid., and the Swedish case NJA 1990 s. 745.

augmented as a result merely of the existence of an agreement to negotiate.¹⁰³ The significance of such an agreement depends on the degree of formality, the level of detail in the agreement and the phase of the negotiations,¹⁰⁴ and Norwegian courts will consequently also take a holistic approach when assessing whether a pre-contract imposes further duties on the parties.

The position of Chinese law towards whether the threshold for becoming liable might be lowered as a result of such vague terms being defined in writing, is uncertain. It is submitted that the threshold will become lowered as the formation of a written pre-contract proves that the parties are conscious of their duties towards each other.

Even if the existence of a written agreement generally will result in a lower threshold for becoming liable within both of the legal systems, there might however be differences as to how the threshold is affected.

2.7 Duty to apply for approval or registration

2.7.1 Introduction

Sometimes the content of a final contract that is entered into cannot be performed without an approval or registration from the authorities. Being well aware of such requirements, parties tend to agree that one of them holds responsibility for going through with the application. Here, the question will be whether failure to apply for such approval or registration may result in liability under the law of pre-contractual liability within Chinese and Norwegian law.

2.7.2 Chinese law

The issue of whether this situation is affected by the standard of "good faith" in Article 42 (3), was addressed by the SPC in the 2009 Interpretation II on Several Issues concerning the Application of the Contract Law of the People's Republic of China¹⁰⁵ Article 8. It stated that:

¹⁰³ Ibid. p. 362.

¹⁰⁴ Ibid., p. 244.

¹⁰⁵ Promulgated on April 4 2009 and effective as of May 13 2009.

"After the formation of a contract which does not become effective until it is approved or registered under a relevant law or administrative regulation, if the party which has the obligation to apply to go through the approval or registration formalities fails to do so under the relevant law or contractual provisions, such failure shall fall within the scope of "taking any other act contrary to the principle of good faith", and the people's court may, as the case may be, and upon the request of the opposite party, rule that the opposite party shall go through the relevant formalities by itself. However, the other party shall be liable for compensating the opposite party for the expenses incurred thereof and the losses actually caused to the opposite party."¹⁰⁶

The interpretation provides that failure to apply for approval or registration constitutes breach of a pre-contractual duty even though such failure occurs after the conclusion of a final contract. The same legal rule was endorsed in the SPC case of *Guangzhou Xianyuan Real Estate Co. vs Guangdong Zhongda Zhongxin Investment Planning Co.*¹⁰⁷

2.7.3 Comparison with Norwegian law

If two parties enter into a contract and agree that one of them has to apply for approval or registration, the party that fails to do so will breach its contractual duties. The situation will therefore be remedied in accordance with the rules of general contract law, meaning that no *pre-contractual* liability may be imposed. Even though the two legal systems operate with systematically different approaches, liability of similar nature will be imposed under both set of rules.

¹⁰⁶ Translated by Han, p. 162.

¹⁰⁷ SPC Gazette, 2010, No. 8, p. 27.

3 Remedies for pre-contractual liability

3.1 Introduction

A party that is negotiating a contract has two separate interests; one a positive, and the other negative. The positive interest is the situation the party would have been placed had the contract been concluded and fulfilled. This is generally termed the expectation interest. The negative interest is the position the aggrieved party would have enjoyed had he never entered into negotiations with the breaching party, a concept widely known as the reliance interest. As will be shown below, it is mainly the reliance interest that can be claimed for losses occurred at the pre-contractual stage. The objection against allowing the expectation interest to be covered at the negotiation stage, is the conflict it creates with the general rules of contract law. The expectation interest can be compensated for in the event a contract is breached and allowing compensation for pre-contracts to the same extent as that of an already concluded contract, creates disharmony within this legal field.

This part will examine which remedies that may be claimed when a pre-contractual obligation is breached. The two general categories of remedies – legal and equitable – are both relevant concerning pre-contractual liability in China and Norway. In the category of legal remedies are damages. In the category of equitable remedies relevant to this assessment are specific performance and restitution. Both within Chinese and Norwegian law, compensation is the main type of remedy and will hence receive the greatest focus (subchapters 3.2 and 3.4). I will however also comment on the mentioned equitable remedies (subchapters 3.3 and 3.5).

3.2 Compensation for damages under Chinese law

3.2.1 Reliance damages

The Articles regarding pre-contractual liability in China solely focus on the circumstances in which liability may arise, and not the nature and assessment of the size of compensation. Both legal scholars and judges are however in consensus that the wording "compensation for

damages"¹⁰⁸ in Article 42 of the CCL refers to the aggrieved party's reliance interest and not its expectation interest.¹⁰⁹ The aggrieved party consequently has the right to be put into the same financial position it would have been in had the breach of the pre-contractual obligation not occurred. This includes out-of-pocket expenses in connection with preparing negotiations, conducting negotiations and evaluating the suggestions and proposals of the opposite party.

Generally, causation between the breach of the pre-contractual obligation and the loss suffered must be proven. Chinese courts have however, in certain situations, deviated from this principle by offering compensation for expenses that would be experienced without regard to the pre-contractual breach. In the case of *Shandong Binzhou Jiangong Jituan Co. Ltd. v Binzhoushi Binchengqu Weishengju Weishengjiandusuo*,¹¹⁰ rendered by the Intermediate People's Court of Binzhou City of Shandong Province, the defendant withdrew from the negotiations without justification and the Court decided that he had to compensate for the loss of the plaintiff, including the bidding costs. Since this expense would be incurred regardless of the pre-contractual breach, the case is an example of how compensation for breach of a pre-contractual obligation may be extended beyond the reliance cost.

Another exception to the main rule that the reliance interests may be recovered, is that only losses that were reasonably foreseen at the time of the pre-contractual breach are recoverable.¹¹¹

According to some decisions, a further possible modification of the main rule is that the reliance damages may not exceed the size of the expectation interest,¹¹² and some Chinese scholars advocate this position.¹¹³ The reason for this is that the plaintiff in such a case would have entered a losing bargain had the contract been concluded, and allowing full compensation for the reliance is considered to be a way of permitting the aggrieved party to shift his losses towards the defendant.¹¹⁴ Ding is of the view that the legal basis for this opinion is dubious,¹¹⁵ and because of the disagreement between courts and legal scholars, the

¹⁰⁸ Translated by Ding, p. 14.

¹⁰⁹ Ding, p. 14.

¹¹⁰ (2017) Lu 16 Min Zhong No. 1410.

¹¹¹ Ding, p. 15.

¹¹² Ibid.

¹¹³ Han, p. 167

¹¹⁴ Ibid., p. 168.

¹¹⁵ Ding, p. 15.

current law relating to the question of whether the reliance interest may exceed the expectation interest within Chinese law appears to be uncertain.

Expected profit upon full performance of the contract – the expectation interest – is under no circumstances possible to be *compensated* for, and will, therefore, not be discussed further in this subsection.

3.2.2 Indirect loss

Beyond losses of direct character, such as expenses related to the preparation of the performance of the contract and travel costs in connection with negotiations, Chinese courts have also allowed for *indirect loss* to be covered. Concerning pre-contractual liability, this refers to lost gain as a result of loss of opportunity to contract with a third party or making alternative investments. Although Chinese courts are split in relation to whether indirect losses are covered, the prevailing judicial view is in favour of recoverability of such loss.¹¹⁶ An example is the case of *Xia v Ren and Li*,¹¹⁷ rendered by the Intermediate People's Court of Jining City of Shandong Province, where the plaintiff, as a result of the defendant's breach of a pre-contractual obligation, lost an opportunity to spend RMB 33 000 to purchase real estate. 19 years later, the value of that property had increased to RMB 1.49 million, and the court awarded as much as 1.33 million in damages for lost opportunity.

It is however worth mentioning that another court reached the opposite result in a case with similar facts. Therein the court simply stated that the scope of recoverable damages does not include indirect loss caused by breach of a pre-contractual obligation.¹¹⁸ This deviation can probably be explained by the factors that will be presented in chapter 4 of this thesis.

3.2.3 Comparative fault

Whether liability may be reduced as a result of a contributory fault from the aggrieved party, is not regulated in Article 42 of the CCL. Although often failing to mention the legal basis for it,¹¹⁹ Chinese courts generally consider comparative fault when determining the amount of

¹¹⁶ Ding, p. 15.

¹¹⁷ (2017) Lu 08 Min Zhong No. 4635.

¹¹⁸ Ding, p. 16.

¹¹⁹ Sometimes Article 58 of the CCL is applied by analogy.

damages for pre-contractual liability. This can for instance be based on the plaintiff's failure to mitigate the loss after becoming aware of the pre-contractual breach of the defendant.¹²⁰

The correct approach in deciding each party's apportionment of damages incurred by the other is to first determine the respective losses of each party and then the proportion of liability of each party towards the other party's losses.¹²¹

3.3 Equitable remedies under Chinese law

3.3.1 Substituted Specific Performance

An exception to the general position that only the reliance interest may be recovered is contained in the situation envisaged at subchapter 2.7, namely when one of the parties has a duty to apply for approval or registration and fails to do so. In that case, the aggrieved party is, under Article 8 of the Interpretation II, not only entitled to compensation, but may also request that the aggrieved party goes through with the procedure himself as "substituted specific performance".¹²² The legal effect is equivalent to that of specific performance, which orders the breaching party to satisfy the formality requirement for performance of the contract.

3.3.2 Unjust enrichment

Where a party illegitimately takes advantage of such confidential information as discussed in subchapter 2.5, the aggrieved party may, in addition to claiming compensation for reliance loss according to Article 43, be entitled to the profits derived by the infringer as a result of the infringement.¹²³ Furthermore, compensation can be claimed for reasonable expenses related to *investigating* the infringer's unfair competition acts that have violated the lawful rights or interests of the infringed business.¹²⁴

¹²⁰ Ding, p. 17.

¹²¹ Ibid.

¹²² Translated by Han, p. 162.

¹²³ E.g. Article 17 of the 2019 Anti-Unfair Competition Law.

¹²⁴ Ibid.

3.4 Compensation for damages under Norwegian law

3.4.1 Reliance damages

In Norway, compensation for pre-contractual liability is often filed as an alternative claim to the primary claim that the parties have entered into a contract. In none of the few cases adjudged by the Supreme Court concerning pre-contractual liability, has a claim for compensation on that basis succeeded. Therefore, the rules on compensation for breach of pre-contractual duties is not well-developed within Norwegian law. It is however certain that the main rule is that compensation for the reliance interest may be claimed.¹²⁵

However, not all expenses occurred as a result of a pre-contractual breach are recoverable as compensation from the losing part. Within Norwegian law, there is a general requirement that the loss is adequate. Simonsen, however, points out that since the protection that compensation for breach of pre-contractual obligations offers generally can be tied to the aggrieved party's reasonable expectations, only loss-inducing acts that are motivated by such expectations are recoverable.¹²⁶ If this reflects the applicable law, it involves a reduction in liability compared to what is recoverable according to the general rules of foreseeability; it is not normal to assess whether the loss of the breaching party was a result of reasonable expectations.¹²⁷ The most typical losses that are included in 'reasonable expectations' are costs related to preparing proposals to be sent to the opposite party, expenses in connection with the negotiations itself, and money spent on re-examination and control with the other party's proposal's during the course of negotiations.¹²⁸

Simonsen further holds that the reliance interest is limited to whether the use of resources was reasonable, the situation of the aggrieved party taken into consideration. Such considerations were also highlighted in the Supreme Court case of *Stiansen*, where the court, despite the defendant's pre-contractual breach, commented that the aggrieved party was not entitled to compensation for construction work commenced before the contract for such activity was concluded.¹²⁹

¹²⁵ Rt-1992-1110 (*Stiansen*), p. 1115-1116.

¹²⁶ Simonsen, p. 342-343.

¹²⁷ Although contributory negligence is possible under both Chinese and Norwegian law.

¹²⁸ *Ibid.*, pp. 339-341.

¹²⁹ Rt-1992-1110, p. 1115.

Case law from the Swedish Supreme Court shows that where the duty to inform is not complied with, expenditures in reliance to received information is generally recoverable to a larger degree.¹³⁰ The same consideration has been made by the Norwegian appellate court,¹³¹ and Simonsen supports this view.¹³²

3.4.2 Expectation damages

The Supreme Court of Norway has expressed that the expectation interest traditionally has not been recoverable as a loss suffered at the pre-contractual stage.¹³³ Simonsen however holds that since pre-contractual situations vary so much, each case must be assessed on an individual basis.¹³⁴ He mentions three factors that, especially combined, may serve as reason for getting covered the expectation interest at the pre-contractual stage. The first is whether the pre-contractual situation is of a nature equivalent to a contract, the second to increase the requirements for degree of probability, and the third to require a qualified breach of a pre-contractual duty.¹³⁵ He details, as an example, that a written record of a duty of exclusivity and a letter of intent with vague formulations normally will both be of a nature equivalent to a contract and will render it easier to prove a breach. He is therefore open to accepting compensation for the expectation interest in such cases.¹³⁶

The abovementioned cases from the Supreme Court were handed down after Simonsen presented his views and, in suggesting the current law, Simonsen puts weight to the fact that the question was unanswered by authoritative sources. The formulation in the cases are, however, that the performance interest "traditionally" has been considered as not being protected. The Supreme Court has therefore not excluded that compensation can be claimed for expectation damages at the pre-contractual stage. As the Supreme Court has not yet heard a case concerning the issue, it is however uncertain whether the factors which Simonsen advocates as grounds for awarding compensation for the expectation interest expresses the current law.

¹³⁰ NJA 1963, p. 105.

¹³¹ LB-2003-8482.

¹³² Simonsen, p. 343.

¹³³ Rt-2007-425, section 32 and Rt-2010-1478, section 33.

¹³⁴ Simonsen, p. 359.

¹³⁵ Ibid. p. 359-361.

¹³⁶ Ibid. p. 362.

Where a party can be compensated for the expectation interest, Simonsen suggests operating with an intensified standard of proof and highlights that proving a causal link can be very challenging.¹³⁷

3.4.3 Indirect loss

Traditionally, there has been some disagreement in the Nordic countries regarding whether a fault when contracting that leads to loss under the heading of 'loss of opportunity' either to contract with a third party or make alternative investments is covered.¹³⁸ This position involves obtaining compensation for the *expectation* interest, whilst the expenses are actually a result of *relying* on activity made by the opposite party.

The appellate court has given such compensation.¹³⁹ The judgment was, however, based on the view of Simonsen, and although Simonsen leans towards the position that indirect loss of such nature is covered, he clearly states that the answer to the question is uncertain. The decision was further reviewed by the Supreme Court, who found that there was no pre-contractual breach. The Supreme Court therefore did not need to review the part of the judgment from the lower court that dealt with the issue as to whether indirect loss is recoverable, and consequently did not discuss the issue. The appellate court's inaccurate reference to Simonsen combined with its failure to handle the liability issue correctly, still speaks to the fact that the argumentative value of the case is limited.

If indirect loss may be covered, Simonsen holds that where there is a causal link between the acts or omissions of a breaching party and the aggrieved party's omission to enter into a losing bargain with a third party, the tortious party can, according to the rules on compensation, obtain relief for an amount equivalent to that which would have been lost had the aggrieved party entered into the losing bargain with the third party.¹⁴⁰

Whether the rules of causality are defined by the promise the aggrieved party reasonably has relied on or the general rules of causality is, according to Simonsen, uncertain. He also suggests that it might be a requirement that the contract negotiations objectively obstruct the

¹³⁷ Simonsen, p. 363.

¹³⁸ Ibid. p. 346.

¹³⁹ LF-2005-28854 (Frostating)

¹⁴⁰ Simonsen, p. 349.

alternative agreement in order to fulfil the causality criteria.¹⁴¹ Suffice is to say that in the absence of any authoritative sources, the current law regarding causality for indirect loss is inconclusive.

3.4.4 Comparative fault

Where there is a pre-contractual breach, Norwegian law mainly seeks to protect the reasonable expectation and well-founded use of resources of the aggrieved party. The threshold for becoming liable is also high, which means that the aggrieved party will rarely be entitled to any compensation at all if it contributes to the breach. Because of the obvious conflict between being entitled to compensation and contributing to the loss, the second vote¹⁴² stated the following in the Supreme Court case of *Malvik*: "When the local council through its conduct has given the co-operative building society a reasonable expectation, in which it has acted in reliance to, there is no room for liability for contributory negligence".¹⁴³

¹⁴⁴

Simonsen is however of the view that liability for contributory negligence might be possible in some cases.¹⁴⁵ He mentions three categories as examples. The first is where the breaching party has given misleading information that the aggrieved party has relied on and from an objective standard had reason to rely on but due to his individual qualifications *should* have understood was wrongful. Secondly, he considers the situation where the aggrieved party contributes to the breaching party's conduct. Here, such liability may also be imposed according to Simonsen. An example is where A and B negotiate, and A pulls out due to information given by B that was wrongfully perceived as negative, but B can be blamed for not expressing himself more clearly. Finally, Simonsen presents the situation where a party has reasonable grounds for relying on the opposite party's promise and as a result ends up making disproportionately large investments, and comments that the aggrieved party should bear the part of the loss which exceeds a proportionate investment.¹⁴⁶

¹⁴¹ Simonsen p. 347.

¹⁴² The second vote was a minority voter, but there was no express disagreement regarding this issue.

¹⁴³ Rt-1981-462, p. 476.

¹⁴⁴ My translation.

¹⁴⁵ Simonsen, pp. 287-300.

¹⁴⁶ Simonsen p. 291.

Despite the conflict between a party's reasonable expectations on acts or omissions performed by the opposing party and simultaneous contribution to the loss, the situations mentioned by Simonsen seems to be instances where these are compatible. The assessment to be carried out when deciding on whether compensation should be reduced as a result of contributory fault is described in Article 5-1 of the Act on Tort. Several Supreme Court decisions provide guidance to a detailed understanding of this Article.

3.5 Equitable remedies under Norwegian law

3.5.1 Specific performance

As mentioned in subchapter 3.4.2, the expectation interest has within Norwegian law traditionally not enjoyed protection in the pre-contractual phase. According to the Supreme Court case of *Aadalen*, this is even more so in respect of specific performance.¹⁴⁷ With the lack of any authoritative sources speaking to the contrary, it seems that there is no opening for such claims under Norwegian law.

3.5.2 Unjust enrichment

There are two situations that may serve as a basis for restitution of unjust enrichment. Firstly, enrichment resulting from activity by the party entitled to the information and, secondly, enrichment resulting from the other party's behaviour.

The legal scholar Monsen has written an article in respect of the first situation, and after a thorough review of existing sources, he concluded that supply of *considerable enrichment* may function as a foundation for compensation to the extent that it is considered to be *reasonable*.¹⁴⁸ Given the lack of any authoritative sources, the existence of such a narrow exemption as advocated by Monsen remains uncertain.

Where the opposing party has actively acquired the enrichment, there are several circumstances in which statutory laws protects the aggrieved party. In cases of infringement

¹⁴⁷ Rt-2010-1478, paragraph 33

¹⁴⁸ Erik Monsen, "Betalingskrav på berikelsesrettslig grunnlag i kjølvannet av havarerte kontraktsforhandlinger og som supplement til regler om pristillegg for tilleggs- og endringsarbeider, in *Tidsskrift for forretningsjus*, Volume 24, part 2 (2018) (pp. 159-190), subchapter 4.4.3.

of intellectual work as defined in the 2018 Copyright Act, the profit must be compensated in accordance with Article 81 first paragraph section c. Where a party has been trusted with a business secret or confidential technical information when conducting business and has unlawfully taken advantage of or copied the product of the other business, restitution can be claimed according to the 2009 Marketing Practices Act Article 48 b paragraph one section c).

3.6 Comparative summary of the remedies

Common to both Chinese and Norwegian laws is the fact that it is mainly only the reliance interest that can be compensated in the pre-contractual phase. With a minor exception in Chinese law,¹⁴⁹ both legal systems require causality between the loss suffered and the act or omission that constituted a pre-contractual breach. While losses that are reasonably foreseen may be covered within Chinese law, only losses based on a party's reasonable expectations from the opposite party are likely to be recoverable under Norwegian law. Further, the loss is probably limited to reasonable use of resources in Norway, while no such restriction exists within Chinese law. In some cases, however, the amount of compensation for reliance damages will be limited to the size of the expectation interest in China.

It is not generally considered possible to receive compensation for the expectation interest in China. However, there may be an opening for this in Norway, albeit limited to rare circumstances and a higher standard of proof.

Chinese law leans towards the acceptance of the award of compensation for indirect loss, even though there is a disagreement concerning whether such loss may be recovered. Indirect loss is also likely to be recoverable in Norway and, with regard to the rules of causality, uncertainty prevails as to whether it is the general rules of causality or the promise the aggrieved party reasonable has relied on that is applicable. Further, there might be a requirement that the conduct of the breaching party objectively has obstructed a conclusion of the alternative agreement.

While comparative fault undoubtedly is relevant for measuring losses resulting from a pre-contractual breach within Chinese law, Norwegian law has been more sceptical towards operating with such a rule. It however seems that the objection against it is that it is

¹⁴⁹ The bidding expenditures that would be incurred independent of the pre-contractual breach.

practically impossible. It is therefore likely to be accepted in the situations presented by Simonsen.

With regard to specific performance, Chinese law operates with the peculiar variant that substituted specific performance can be claimed when a party which was supposed to apply for approval or registration under the agreement fails to do so. On the other hand, Norwegian law does not accept specific performance at the pre-contractual stage at all.

There is no legal basis in the CCL for restitution on the basis of unjust enrichment where the breaching party has played a passive role while receiving enrichment. Whether there is a small opening for this within Norwegian law, is uncertain. Unjust enrichment can, however, be claimed for the active unjustified acquirement within both legal systems.

Although the main characteristics to a large degree are the same when it comes to remedies for breach of pre-contractual duties within Chinese and Norwegian law, there seem to be many differences on closer analysis. A lot of the legal rules in respect of remedies for pre-contractual liability are, at least on a detailed level, inconclusive in both legal systems.

A possibly very different regulation between China and Norway is the remoteness issue in the pre-contractual phase. While case law from Chinese courts seem to accept wide-ranging liability when pre-contractual obligations are not complied with, the existing legal sources in Norway speaks to the fact that stricter rules on causality applies. A consequence is that the potential size of the amount that the breaching party may be answerable for compensating, is greater within Chinese law than is the case pursuant to Norwegian law.

4 Certain important features of the Chinese legal system and culture that influence the practical application of the doctrine of pre-contractual liability

4.1 Introduction

In order to conduct a meaningful analysis of how the doctrine of pre-contractual liability in China is to be understood in practice, it is fundamental to address certain characteristic features of the Chinese legal system and culture which to a large degree influence the practical applicability of the doctrine.

4.2 Unpredictable dispute resolution

4.2.1 Political influence

In most civilised legal systems, state power is divided into three branches; namely the legislature, executive and judiciary. This concept is known as *separation of powers* and serves the purpose of preventing abuse of power through the three branches' checks and balances towards each other.

In China, the National People's Congress of the Chinese Communist Party (NPC) is the national legislature. The very same body is also placed above both the executive and judiciary in the hierarchy of powers. Consequently, there is no separation of powers in the shape of the three above mentioned branches in China.¹⁵⁰ The president of China and general secretary of the Party, Xi Jinping, in fact said in a speech made on August 24th 2018 that "[China] must never follow the path of Western constitutionalism, separation of powers, or

¹⁵⁰ This is even laid down in Article 57 of the 2018 Constitution of the People's Republic of China (the Constitution). See in particular Articles 62, 63 and 133 as examples on how the NPC is on top of the hierarchy of powers.

judicial independence".¹⁵¹ It may however be difficult to grasp how the relationship between the CCP and the judiciary exactly operates in practice, and the topic has been widely debated among Chinese scholars.¹⁵² I will limit this exposition to a few undisputable facts.

In order to enhance their career or even maintain their position, judges have to demonstrate complete loyalty to the Party; the CCP is responsible for the appointment, removal and rotation of top officials of the judiciary and the executive.¹⁵³ ¹⁵⁴ The judges further receive their salary from the local governments, which is assumed to leave them in a state of dependence.¹⁵⁵ The CCP will also participate in the handling and even decision of specific cases.¹⁵⁶

Furthermore, Chinese society is very dynamic, and the political system is extremely efficient in carrying out desired goals. Therefore, political changes happen very rapidly, particularly in respect of new regulations and instructions towards the judiciary from the Party. Combined with the fact that the SPC's decisions do not carry any precedent and that laws often are formulated in a vague manner so that the Party has a wide discretion in instructing the courts on a case-by-case basis, the legal system is markedly unpredictable.¹⁵⁷

4.2.2 Local protectionism

The political influence on court decisions can easily result in private companies and especially foreign companies becoming victim of local protectionism. Research shows that if the plaintiff has a residence which coincides with the court's, it will generally have an

¹⁵¹ Charlotte Gao, (2019, February 19). Xi: China Must Never Adopt Constitutionalism, Separation of Powers, or Judicial Independence. *The Diplomat*, Retrieved from <https://thediplomat.com/2019/02/xi-china-must-never-adopt-constitutionalism-separation-of-powers-or-judicial-independence/>

¹⁵² For a detailed account, see Ling Li, "The Chinese Communist Party and People's Courts: Judicial Dependence in China", in *The American Journal of Comparative Law*, Volume 64, Issue 1, 1 March 2016, pp. 37-74.

¹⁵³ Mei Ying Gechlik, (2003, October 29). The Chinese Communist Party's Leadership and Judicial Independence. *Carnegie Endowment for International Peace*.
<https://carnegieendowment.org/2003/10/29/chinese-communist-party-s-leadership-and-judicial-independence-event-650>

¹⁵⁴ See as examples Articles 62 and 63 of the Constitution.

¹⁵⁵ Thomas Lagerqvist & Ulf Ohrling, *Quotations from a China Practice*, second edition, Stockholm 2015, p. 94.

¹⁵⁶ Despite Article 126 of the Constitution laying down that the people's courts are independent, Article 128 speaks clearly to the contrary, and there is no doubt that there is a de facto interference in practice.
<https://carnegieendowment.org/2003/10/29/chinese-communist-party-s-leadership-and-judicial-independence-event-650>

¹⁵⁷ Lagerqvist/Ohrling, p 103.

increased possibility of succeeding with the litigation¹⁵⁸. Private companies are also frequently discriminated against to the advantage of state-owned enterprises (SOEs).¹⁵⁹ This is especially so in rural areas and in less developed provinces. Such discrimination can however also take place in more developed areas such as Beijing, Shanghai, Guangzhou and Shenzhen.¹⁶⁰

4.2.3 Local differences

China is the world's most populous country and the fourth largest by area. In many ways, China is in fact more a continent than a country. Its combined size is more than double that of all EU-countries combined, with each province the size of a European country and more than forty spoken languages and distinct regional differences.¹⁶¹ This divergence in local policies between various regions and the difference in the judges' cultural background and thereby premises for understanding the law, results in local differences in how laws are applied. This makes dispute resolution unpredictable.

4.3 Chinese culture

4.3.1 Guanxi

Despite the above-mentioned factors that make China a diversified country, the vast majority of the people share the same core cultural values. Among these are the concept of *guanxi*, which literally means "relationships". In the Chinese business environment, the concept refers to a network of relationships consisting of various parties that cooperate and support each other.¹⁶² Within the network, favours are exchanged regularly and voluntarily in a reciprocally proportional manner.¹⁶³

Since such a network is often crucial in order to succeed with a business in China, such as in obtaining permits, partners or investors, developing and maintaining it requires great focus.

¹⁵⁸ Cheryl Xiaoning Long & Jun Wang, "Judicial local protectionism in China: An empirical study of IP cases", in *International Review of Law and Economics*, Volume 42, June 2015, pp. 48-59, chapter 1.

¹⁵⁹ Lagerqvist/Ohrling, p. 93.

¹⁶⁰ Ibid. p. 93-94.

¹⁶¹ Ibid. p. 26.

¹⁶² Ibid. p. 51.

¹⁶³ Ibid.

While resorting to litigation generally will be acceptable among professional parties in the Nordic countries, this is not the case in China.¹⁶⁴ The interpersonal relationship in the form of *guanxi*, which served as a prerequisite for collaborating in the first place, will then break. A consequence of this is that many businesses will refrain from initiating court proceedings over disputes with a business partner with whom they intend to do business in the future. The formal laws on pre-contractual liability are therefore largely without significance in many situations because the norms that have been developed within the parties' *guanxi* are decisive for what is regarded as acceptable conduct when negotiating a contract.

4.4 Comparison with Norwegian legal system and culture

Separation of powers is considered to be one of the main principles the Norwegian legal system is based upon.¹⁶⁵ The division appears from The Constitution of 1814; the government is according to Article 3 the executive, the people according to Article 49 the legislature, whilst the courts according to Article 88 are the judiciary. There is consequently no acceptance towards political influence on court decisions in Norway, and the judges are considered to be fully independent and impartial. Local protectionism is neither considered to be a problem within Norwegian law. Despite the existence of cultural differences, these are much more limited than in China, and no voices has advocated that they affect legal reasoning in a way that makes dispute resolution in Norway unpredictable.

Although the principle of *guanxi* does not have a Norwegian equivalent, relationships are naturally of significance when it comes to choosing business partners also in Norway. An important difference however lays in whether the business relationship will survive a litigation. Even though going to court in itself or consequences such proceedings bears with it may indeed result in dissolution of a partnership in Norway, taking legal actions is to a large degree accepted within Norwegian business culture. If the parties fail to agree, a court of law is considered to have both high proficiency in applying the law and to offer a trustful dispute resolution.¹⁶⁶ When it is the law the parties disagree on, courts are consequently considered to be well-placed in deciding which one of the parties that were "right", and their business

¹⁶⁴ Ibid. p. 103.

¹⁶⁵ Although Norway has a parliamentary system.

¹⁶⁶ Iwar Arnstand (2018). *Stabilt høy tiltro til domstolene*. In *Rett på sak*, volume 4, pp. 4-5.

relationship will often continue in a well-functioning manner after the judgment has been delivered.

5 Comparative summary

The above chapters have identified the main differences and similarities of the law of pre-contractual liability in China and Norway and given an account of certain important features of the Chinese legal system influencing how the doctrine is applied in practice. This chapter will summarize the findings the comparison has resulted in.

In the introduction to this thesis, I mentioned the different approaches taken by common and civil law jurisdictions towards pre-contractual liability. Both Chinese and Norwegian law has taken the approach of the latter, and the doctrine of pre-contractual liability is consequently applied in both countries.

However, the law of pre-contractual liability is not particularly developed within either legal system. Although the main concepts and starting points are indisputable, the two jurisdictions offer a limited number of authoritative sources; both in relation to which general factors that are relevant and their weight, and whether various types of behaviour are acceptable or not when negotiating. It also concerns whether general tort law principles are applicable to the remedy assessment, or if special rules apply.

The limited number of authoritative sources does not mean, however, that there is nothing to be said about the relationship between the Chinese and Norwegian law of pre-contractual liability. Except for the specific situations that are regulated separately in China, the starting point for the liability assessment, in both legal systems, consists of a general formulation that encompasses a large variety of bad faith behaviour. Furthermore, a common fundamental requirement for imposing liability is that fault, meaning either intent or negligence, must have been shown in breaching the pre-contractual obligation. The general basis for assessing whether a person is at fault is also of similar nature. In China, the key test is whether the defendant's behaviour falls below what is expected of a reasonable person on the basis of the moral, social and commercial standards of conduct prevailing in the community concerned. Similarly, according to Norwegian law, the test is whether the party has acted as would a reasonable person of ordinary prudence have done, with regards taken to the respective area of life in which the conduct takes place.

The presentation of certain relevant types of situations in chapter 2 of this thesis, further supported that Chinese and Norwegian law in many types of situations bear similarity. Some of the instances appeared to be different but were actually similar in practice. The additional requirement that the entitled person in China must take reasonable measures to protect the secrecy of the information in situations as described in subchapter 2.5, is, for instance, unlikely to involve any significant difference compared to Norwegian law. Other rules seemed dissimilar because of systematic difference; the law of pre-contractual liability has more of an individual status as a legal doctrine in China and can function in concurrence with general tort and contract law. In Norway, however, there is no such overlap. Situations as described in chapter 2.7 about duty to apply for approval or registration may, for instance, not be placed under the category of pre-contractual liability in Norway, but similar rules within general contract law are applicable.

Although the topic of assessments is often formulated in the same way, many of the discretionary assessments that must be carried out, both concerning the starting point for the basis of liability and the application of the law to various types of situations, will often lead to different results. One reason is simply the fact that the cultural norms and values in the two countries differ. Also, a more unified comprehension of what is reasonable conduct when negotiating is likely to be based on people's common perception in Norway. In China, however, the view on what is considered acceptable behaviour when negotiating depends on the geographical location of the court handling the case. Political influence and the existence of local protectionism are other factors making application of the law unpredictable.

To summarize, although the assessments that must be carried out when considering the basis of liability is similar in China and Norway, the result of the assessment is expected to differ in many cases. And while the perception of the norm for acceptable behaviour is expected to be fairly unified in Norway,¹⁶⁷ Chinese law is less predictable.

The fact that the amount of authoritative legal sources concerning the rules on pre-contractual liability within Chinese and Norwegian law is limited, also affects how clarified the rules on remedial consequences are. The general principles related to remedies for breach of contract are however well-developed in both jurisdictions, and these will be applied at the pre-

¹⁶⁷ See also Simonsen, p. 218.

contractual stage to the extent that they are considered fit. As shown in subchapter 3.6, there seem to be many differences between the countries on a detail level. A possibly large difference concerns the causality requirement; Norwegian law is expected to reduce the possible extent of responsibility compared to general tort law principles, whilst Chinese law adopts its general tort law. Despite the loss suffered being the same, the aggrieved party may consequently enjoy better protection under Chinese law than what is the case under Norwegian law. This may especially be so concerning indirect loss.

The features highlighted in chapter 4 of this thesis is likely to entail that Chinese courts, in some instances, also will apply the rules on remedies as they consider appropriate. An illustrative example is the case where the plaintiff was compensated for its bidding costs although this expense would be incurred regardless of the pre-contractual breach.

To summarize, Chinese and Norwegian law are similar in that they both adopt many general tort law principles to the pre-contractual stage. However, Chinese courts seem to impose a larger variety of remedial consequences than Norwegian courts and recover greater losses, which means that the potential consequences of a pre-contractual breach are greater in China.

The current law of pre-contractual liability is not expected to change in the near future in any of the two legal systems. In Norway, the non-statutory nature of the doctrine is expected to remain, and the Supreme Court hears a very limited number of cases regarding this doctrine. The development will hence happen slowly. However, the progress of the law of pre-contractual liability is expected to move even slower in China. The many unclarified details are possibly a result of a desire to retain a wide discretion so that the authorities may execute political power in an effective manner. Ensuring local and state interests will, after all, be easier within the frame of such a norm. Moreover, if detailed rules are given in China, unpredictability will nevertheless prevail as long as the features of the Chinese legal system as highlighted in chapter 4 continues to affect the applicability of legal rules.

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English title	Chinese title	Date of promulgation
Constitution of the People's Republic of China	中华人民共和国宪法	11 March 2018

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In chronological order

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Patent law of the People's Republic of China	中华人民共和国专利法	27 December 2008
Copyright Law of the People's Republic of China	中华人民共和国著作权法	26 February 2010

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Reply of the State Administration for Industry and Commerce to the Constituent Elements of Trade Secrets	最高人民法院关于审理买卖合同纠纷案件适用法律问题的解释	10 May 2012

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English title	Norwegian title	Date of enactment
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English title	Norwegian title	Date of enactment
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The Public Administration Act	Lov om behandlingsmåten i forvaltningssaker	10 February 1967
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Tort Act	Lov om skadeserstatning	13 June 1969
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The Criminal Act	Lov om straff	20 May 2005
Marketing Practices Act	Lov om kontroll med markedsføring og avtalevilkår mv.	9 January 2009
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